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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 528 and 663

NACIREMA OPERATING CO., INC. AND LIBERTY MUTUAL INSURANCE COMPANY, *Petitioners*,

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT AVERY, *Respondents*.

JOHN P. TRAYNOR AND JERRY C. OOSTING, Deputy Commissioners, *Petitioners*,

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT AVERY, *Respondents*.

BRIEF FOR RESPONDENTS WILLIAM H. JOHNSON and JULIA T. KLOSEK

OPINIONS BELOW

The statement in the Brief of the Deputy Commissioners is adopted.

JURISDICTION

The statement in the Brief of the Deputy Commissioners is adopted.

STATUTES AND LAW INVOLVED

The statement in the Brief of the Deputy Commissioners is adopted with the following supplement:

Constitution of the United States

Article 1, Section 8, Clause 3. Regulation of commerce.

(The Congress shall have Power . . .)

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article 3, Section 2, Clause 1. Jurisdiction

The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . .

QUESTION PRESENTED

Does the Longshoremen's and Harbor Workers' Compensation Act cover injuries occurring "upon the navigable waters of the United States" on the deck of a pier as well as the deck of a ship when the precipitating instrumentality is a shipboard crane?

STATEMENT

The statement in the Brief of the Deputy Commissioners, as to the Johnson and Klosek cases (pp. 4-6), is adopted.

The Court of Appeals in a 5-2 en banc decision held that the injury and death were compensable under the Longshoremen's and Harbor Workers' Compensation Act and remanded the cases. Former Chief Judge Sobeloff, speaking for the majority, cited four reasons for the decision, any one of which was deemed sufficient to establish coverage under the Act. The grounds for the decision were:

1. Congress possessed the constitutional authority to cover all longshoremen injured during the loading, unloading, repairing or refitting of vessels, and exercised the full scope of its authority by designing the Act to reach all

injuries sustained by longshoremen in the course of their employment; it did not intend to "freeze coverage to injuries occurring within the admiralty tort jurisdiction as it was thought to exist in 1927 . . ." (398 F. 2d at 904; App. 48).

2. If, for the purpose of argument, one assumes Congress had exercised the more limited tort jurisdiction, the phrase "upon navigable waters" must be "construed to include the full range of the legislatively and judicially expanded concept of maritime jurisdiction" (398 F. 2d at 906; App. 52).

3. Small vessels are able to navigate beneath the piers. "These waters are therefore navigable in fact" (398 F. 2d at 908; App. 55, 56).

4. This Honorable Court has twice mandated the humanitarian Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results . . ." and has admonished "(those) subject to the same danger . . . (are) entitled to like treatment under law." The Court of Appeals also adverted to the observations of Judge Soper that "the references therein to 'maritime employment' and the injury 'upon the navigable waters of the United States . . .' should be broadly construed," and that the coverage of the Act "should not be frustrated by needless refinements" (398 F. 2d at 906-909; App. 52-56).

ARGUMENT

I.

Introduction and Definition of Issues

Contemporary Admiralty principles — whether pertaining to maritime employment, maritime jurisdiction or navigable waters — are expanding with such dizzying speed

that Judge Boreman of the Court of Appeals for the Fourth Circuit was led to observe in the longshoreman third-party case of *Scott v. Isbrandtsen Company*, 327 F. 2d 113, 123 (1964):

> "The case books are full of decisions of the inferior federal courts and may serve, in some instances, to illustrate a trend but accepting or following them as authoritative suggests a spirit of *reluctance to heed the changes and is sheer folly.* As precedents they may be *here today and gone tomorrow.*" (Unless otherwise indicated, emphasis throughout is added.)

Over a decade ago, Gilmore and Black aptly stated in their "The Law of Admiralty" (1957), footnote 12, page 253:

> ". . . since the Supreme Court has claimed the field of maritime personal injury litigation as its own, *lower court decisions have suffered from rapid technological obsolescence.*"

The above quotations came promptly to mind after a reading of the briefs filed by Petitioners and the Amicus in support of the Petitioner's position. A commentator with a knack for penchant observations once remarked: Some lawyers are so devoted to the past that they refuse to look at the new moon lest they be accused of disloyalty to the old. By actual tally, of this Court's cases cited in the Brief of Petitioners Nacirema Operating Co., Inc. and Liberty Mutual Insurance Company, only two were decided within the decade 1950-59 and one since 1960; one was decided within the decade 1940-49 and the remaining ten during the early part of this century and the second half of the last century. Of the fourteen cases from this Court cited by the Petitioners Deputy Commissioners, only two fall within the last two decades; the others date all the way back to the 1910-19 decade.

While we are in the prelude portion of the Brief, we might advert to the fact this Court is considering cases involving longshoremen members of a gang who were actively engaged in loading an ocean going freighter tied up at a pier; longshoremen whose duties, rest and lunch periods required them to go back and forth between the vessel and the pier. In the words of the Court of Appeals opinion, below: ". . . the injured longshoremen were members of a gang all of whom did basically the **same work** for the **same pay** and were subjected to the **same risks**, passing freely from ship to pier in the course of their work" (App. 53).

The cases under review involve injuries on the deck of a pier upon navigable waters rather than a ship upon navigable waters. They have nothing whatever to do with a messenger going to an "office downtown", a shipyard worker in a "machine shop", the "driver of a laundry truck" or an employee of a "steamship agency", or any of the other situations conjured up in the Brief of the Amicus. (These far-fetched illustrations are reminiscent of the "faulty cargo in Denver" fantasy argument rejected by the Court in *Gutirrez v. Waterman S.S. Corp.*, 373 U.S. 206, 10 L. Ed. 2d 297 (1963)). We are dealing solely and exclusively with the rights of members of a longshoreman work unit known as a "gang", the duties of whom are substantially interchangeable; in loading or discharging a vessel, some are assigned to work aboard ship and others a few feet away on the pier. The Brief of the Deputy Commissioners recognizes this fact in its admission "it is not uncommon for the men to rotate positions and **pass back and forth between the ship and the pier** during a given loading operation (pp. 4, 5).

What this Court is being called upon to decide is "not of constitutional magnitude", to borrow an expression from

Parker v. Motor Boat Sales, 314 U.S. 244, 248, 86 L. Ed. 186, 190. As shown by *O'Donnell v. Great Lakes Co.*, 318 U.S. 36, 1943, and *Hopson v. Texaco*, 383 U.S. 262, 1966, a constitutional question is not involved in this controversy. The allusions to *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) and *Washington v. Dawson & Co.*, 264 U.S. 219, found in both the Brief of Nacirema and the Brief of Deputy Commissioners are only of historic and academic interest. In substance, each of these cases held that the field of admiralty was exclusively that of the federal government by constitutional grant and that the states could not be permitted to invade that domain, either with or without attempted congressional sanction.

The instant cases look in the other direction. The crucial question is not whether states, with their varying local provisions, may be permitted to interfere with and possibly destroy the uniformity so requisite in the maritime field; it is whether the federal government may legislate in a field over which, according to pre-1927 precedents, the states may also have exercised some degree of dominion. A large number of the cases cited by Petitioners relate to how far this Court has been willing to permit the states to go in legislating in this area. The question in these decisions was, accordingly, one of permissiveness by and not limitation upon the authority of the federal government.

It is too well settled at this time to dispute that even the admiralty power alone is sufficient to support congressional extension of admiralty jurisdiction to damage and injury consummated on wharves and piling clusters as a result of acts and omissions occurring upon navigable waters. Limitation of Liability Act, 1884, 46 U.S.C. 189, *Richardson v. Harmon*, 222 U.S. 96, 106 (1911); *Rivers and Harbors Act*, 1890, 33 U.S.C. 403, et seq., *The Blackheath*, 195 U.S. 361,

364 (1904); Jones Act, 1920, 46 U.S.C. 688, *O'Donnell v. Great Lakes Co.*, 318 U.S. 36, 39 (1943); Admiralty Extension Act, 1948, 46 U.S.C. 740, *Gutirrez v. Waterman S.S. Corp.*, 373 U.S. 206, 210 (1963).

The power of Congress is not restricted by concepts of admiralty jurisdiction as the lower federal courts have already recognized in cases involving other statutes regulating the employment relationship of maritime workers both ashore and afloat and whether building, repairing, unloading or otherwise servicing vessels. Illustrative cases are: *N.L.R.B. v. Norfolk S.B. & D.D. Corp.*, 109 F. 2d 128 (4 Cir., 1940); *Bracey v. Luray*, 138 F. 2d 8, 11 (4 Cir., 1943); *Slover v. Wathens*, 140 F. 2d 258 (4 Cir., 1944); *Newport News S.B. & D.D. Co. v. N.L.R.B.*, 101 F. 2d 841 (4 Cir., 1939). See also *Gilmore & Black, Admiralty* (1957), p. 45: "Congress may legislate for maritime matters under any of the powers given it."

The complementary character of the admiralty and commerce powers (Art. III, sec. 2 and Art. I, sec. 8, respectively) has been familiar since the decisions of Story and Marshall more than a century ago — *United States v. Coombs*, 12 Pet. 72, 76-79 (1838); *Gibbons v. Ogden*, 9 Wheat 1, 189-192 (1824). The two powers are entirely distinct and independent; either or both may be invoked; neither limits the other. *The Genesee Chief*, 12 How. 443, 452 (1851); *The Lottawanna*, 21 Wall. 558, 577 (1875).

Basically, the review revolves about the correct, liberal interpretation of a simple term "upon the navigable waters of the United States" . . . In substance, the Court of Appeals below held that literally "upon the navigable waters of the United States" applies equally to all structures on navigable waters whether the structure be a ship or a pier, and to all injuries, whether the longshoreman be working on

the deck of a ship or the deck of an adjacent pier. The Solicitor General's Brief (at p. 12) quotes the statement of his *Calbeck* Brief that docks and piers, no less than ships, are upon navigable waters (*Gladden v. Stockard S.S. Co.*, 184 F. 2d 510, 512, 3 Cir., 1950).

In the Government's Brief filed as Respondent and supporting the affirmance of the award of benefits in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 8 L. Ed. 2d 368, 1962, the Solicitor General had occasion to compare the benefits available under the federal and the state acts. A similar computation may prove helpful here. Under the Maryland Workmen's Compensation Act, the widow was entitled to up to $48.00 a week for a maximum of 500 weeks, but not to exceed $15,000. At the time of her husband's death, November 14, 1963, Mrs. Klosek was 49 years of age; she was left with three minor children, whose dates of birth were March 31, 1947, March 11, 1950 and July 30, 1955. If Mrs. Klosek lives her normal life expectancy, she will receive $45,419.50; the children, collectively, will receive $17,473.75; the total for the family will be $62,893.25. The benefits under the federal act are, accordingly, more than four times those payable under the state statute.

The juxtaposition of these figures underscores what is probably the predominant issue of these cases, as far as the Amicus National Maritime Compensation Committee is concerned. It is hard economics — simply a question of dollars and cents. In maritime and compensation cases this Court has consistently adhered to the humanitarian view the "human" cost of doing business should be borne by the industry and not saddled upon the disabled workman or his bereaved family. The decisions point out this is much fairer since such costs can be equitably distributed throughout the business enterprise by available insurance.

II.

The Longshoremen's Act is remedial legislation and is to be applied with the broadest liberality to achieve its humanitarian purposes.

One of the early cases in which this Court expressed its solicitude for the safety and welfare of employees engaged in the hazardous occupation of longshoring was *International Stevedoring Co. v. Haverty*, 272 U.S. 50, decided October 18, 1926, before the enactment of the Longshoremen's statute. From *Voris v. Eikel*, 346 U.S. 328, 98 L. Ed. 5 (The act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.) and *Avondale Marine Ways Inc. v. Henderson*, 346 U.S. 366, 98 L. Ed. 77 (A death on a marine railway 400 feet inland from the water's edge was held compensable under the Act.) (both decided in 1953), through *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25, 15 L. Ed. 2d 21 (Defense Bases Act, 1965) to *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731, 18 L. Ed. 2d 488 (1967) (The widow of a longshoreman was permitted to bring a suit against the shipowner who was the direct employer of the decedent.) and *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 20 L. Ed. 2d 30 (1968) (Section 22 of the Act was liberally interpreted to permit a longshoreman's widow to file and recover on a second claim after her first claim was rejected.) there has been a steady procession of cases in which the Act has been applied with sympathetic liberality.

It is elementary that the Act should be applied with the utmost compassion. Reasons should be sought by the Courts to grant remedial awards under the umbrella of its coverage; rationalizations should not be resorted to in an attempt to justify an improper denial thereof. Every doubt must be resolved and every presumption, including that of

coverage, exercised in favor of the claimant (See 33 U.S.C. 920(a)).

A. This Court Has Mandated At Least Twice That in the Application of the Act "Harsh and Incongruous" Results Must Be Avoided.

Mr. Justice Black delivered the opinion in the momentous *Reed v. SS YAKA*, 373 U.S. 410, 10 L. Ed. 2d 488, 1963. In brief, this Court decided that the vessel could be held liable in rem because her bareboat charterer could be held liable in personam, even though the charterer was also the direct employer of the longshoreman — a status which normally would have insulated it from third party or liability actions. One of the most interesting of the cases's many fascinating facets is highlighted in this brief excerpt:

> "We have previously said the Longshoremen's Act **'must be liberally construed** in conformance with its purpose, and **in a way which avoids harsh and incongruous results.'** We think it would produce a harsh and incongruous result, one out of keeping with the **dominant intent of Congress to help longshoremen**, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. . . . As we said in a slightly different factual context, **'All were subjected to the same danger. All were entitled to like treatment under law'** " (373 U.S. at 415).

Ten years earlier this Court admonished that the Act's purposes must not be distorted to bring about a "harsh and incongruous" result (*Voris v. Eikel*, 346 U.S. 328, 1953).

In the instant cases the Act should be applied to longshoremen unloading or loading the ship **"whether they are standing aboard ship or on the pier"**, to lift a phrase from

Gutirrez v. Waterman S.S. Corp., 373 U.S. 206, 10 L. Ed. 2d 297. It would be surpassing strange if the same acts or omissions which give rise to third-party tort claims under federal admiralty jurisdiction were held insufficient to give rise to federal compensation claims. Since this Court because of its concern for the welfare of longshoremen has construed the "open-end" seaworthiness doctrine liberally, should it not interpret the Compensation Act just as broadly? If a longshoreman is entitled to the extraordinary remedy of the seaworthiness doctrine, a fortiori he is entitled to the ordinary remedy of the compensation act.

The Act must be applied in such a fashion as to avoid harsh and incongruous results. Certainly, it would be "harsh and incongruous" to deprive the decedent's widow and family of the protection afforded by the provisions of the Longshoremen's Act and relegate them to the poverty anchored remedy of the stateside compensation schedule. Johnson and the decedent were working upon navigable waters while on the pier, just as other members of the same gang were working upon navigable waters while on the ship; some went back and forth in the course of their work. It is the cruelest type of incongruity to afford one and deny the other the benefit of the Act. In the words of this Court "All were subjected to the **same danger.** All were entitled to **like treatment** under law". Just as this Court in *Reed* refused to "distinguish between liability to longshoremen" because some drew their pay directly from a shipowner and others from a stevedoring company doing the ship's service, so it should refuse to distinguish between injuries sustained on the deck of a ship and on the deck of a pier located "upon navigable waters".

There are two main categories of cases embraced in the Act — injuries sustained upon a "drydock" and those suffered upon "navigable waters", both of which should be

held compensable with consistent liberality. The "drydock" decisions are too plentiful to be developed in detail herein. We wish, however, to call attention to *Holland v. Harrison Bros. Drydock and Ship Repair Yard, Inc.*, 306 F. 2d 269 (5 Cir., 1962) and these excerpts from the opinion of Judge Wisdom:

> "Harrison Brothers counters that when a worker is injured with *both feet planted on dry earth*, there is no federal coverage regardless of whether he may be standing at the water's edge or near a dry dock" (370).
>
> "It seems reasonable to us that any meaningful definition of marine railway should include the land immediately adjacent to the tracks 'that is beneath a ship drawn up on the railway and that must be used in the course of repairing any ship on the railway'. This argument draws strength from the fact that the **general assignment** Holland was performing **was of a basically maritime nature**" (372).
>
> "In determining whether a worker's personal injury claim falls within the federal admiralty jurisdiction or the jurisdiction of the state, courts have regularly looked to both the locality of the accident and the **nature of the work being performed.** The literal language of the Longshoremen's Act seems to concern only the locality of the accident, but the **history** of the Act **indicates** that its **underlying purpose** was **to embrace the admiralty jurisdiction whatever that might be.**" (Citations omitted.) (fn. 4, 372).

The Court of Appeals for the Fourth Circuit, in *Newport News S. B. & D. D. Co. v. O'Hearne*, 192 F. 2d 968, 1951, warned against defeating the beneficent purposes of the Act. Viewing the Act against the backdrop of *Davis v. Department of Labor* 317 U.S. 249, 256-257 (1942), and *Parker v. Motor Boat Sales*, 314 U.S. 244, 249-250, Judge Soper concluded: "The references to 'maritime employment' and injury 'upon the navigable waters of the United States (including any dry dock),' should be broadly con-

strued;" and, further, that the coverage of the act **"should not be frustrated by needless refinements"** (192 F. 2d at 971).

In *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366, 1953, this Court affirmed, per curiam, as "upon navigable waters" an award for fatal injuries sustained on a barge on a marine railway, 400 feet from the water. The Courts have been particularly responsive to affording coverage under the Act to "dry land" injuries. The term "drydock" has been construed to include, graven docks and marine railways as well as the land immediately adjacent thereto. In the Fifth Circuit 1965 *Holland* decision, *supra*, the Court said "any meaningful definition of marine railway should include the land immediately adjacent." Sixteen years earlier the same Circuit in *Maryland Casualty Co. v. Lawson*, 101 F. 2d 732, 733 held the adjacent land was included because "the land was part of the yard necessary to the operation of the marine railway." Philosophically, logically and practically, isn't a pier just as "necessary to the operation" of a ship?

The "incongruous" borders on the ludicrous when an injury sustained 400 feet inland not on a standard drydock, but on a marine railway is held compensable whereas one suffered on a pier jutting 500 feet upon navigable waters is challenged.

B. The Act's Legislative History Supports A Liberal Application.

As former Chief Judge Sobeloff asserted in the opinion below, "Prolonged discussion of this issue is now unnecessary, however, since it has been authoritatively resolved by the Supreme Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962)." Quoting with approval the Fifth

Circuit in *Debardelen Coal Corp. v. Henderson*, 142 F. 2d 481 (1944), the Court stated (App. 49, 50):

> "The elaborate provisions of the Act, viewed in light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, *that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter*. . . . It is sufficient to say that *Congress intended the compensation act to have a coverage co-extensive with the limits of its authority*." 370 U.S. at 130 (Emphasis in Judge Sobeloff's opinion.)

See also the footnote discussion on pages 49 and 50 of the Appendix, particularly the excerpt from *Holland v. Harrison Bros.*, 306 F. 2d 369, 373 n. 4 (1962).

The all embrasive nature of the Act is apparent from its title "An Act to Provide Compensation for Disability of Death Resulting from Injury to Employees in Certain Employments", Act of March 4, 1927, 44 Stat. 1424. Judge Dobie in *Travelers Ins. Co. v. Branham*, 136 F. 2d 873, 875 (4 Cir., 1943) logically concluded:

> "It would seem that **Congress**, in the Act, **intended to exercise to the fullest extent all the power and jurisdiction it possessed over the subject.**"

The following year, Judge Hutcheson of the Court of Appeals of the Fifth Circuit in *DeBardeleben Coal Corp. v. Henderson*, 142 F. 2d 481, 483, expressed it thus:

> "**Congress intended** the Compensation **Act to have a coverage co-extensive with its authority** . . . in the application of the Act, therefore, the broadest ground it permits should be taken."

In applying the Longshoremen's Act, the question, therefore, is the reach of the Admiralty and Commerce powers, taken together, not that of the Admiralty power alone.

Congressionally, the Longshoremen's Act traces its origin to February 1926, when S. 3170 and H.R. 9498 were introduced in both Houses. Two previous attempts to enact a law acceptable to this Court — 40 Stat. 395, Act of October 6, 1917 and 42 Stat. 634, Act of June 10, 1922 — failed. The first draft of the 1926 bill, prepared by the International Longshoremen's Association in conjunction with the American Association for Labor Legislation, was based on the New York law. The legislative history continues through the Senate Concurrence in House Amendments, March 4, 1927.

The debates were relatively brief and concerned themselves principally with the exclusion of crew members from the Act and maintaining $7,500 as the maximum limit of all benefits, including death or permanent injury. (Senate debates, June 3, 1926, 67 Cong. Rec. 10908-14; House debates, March 2, 1927, 68 Cong. Rec. 5402-14; Senate Concurrence in House Amendments, March 4, 1927, 68 Cong. Rec. 5900-09).

At the first session of the Committee on the Judiciary of the Senate held March 16, 1926, Mr. L. B. Clark, on behalf of the U. S. Bureau of Labor called attention to Congress' authority over the "**commerce power**" and explained "... It is the earnest desire of Commissioner Stewart that a bill should **cover the contract, cover the job** and not the man simply when he is on the ship." (Despite the position taken by the Solicitor General in these cases, it is Respondents' understanding that the Department of Labor still adheres to that view at the present time, and in this very case. It is believed the delay in the Government's filing a petition for a writ was attributable to the Department's continuing support of the Fourth Circuit decision).

A careful reading of the legislative history discloses that the Union and Labor representatives were understandably interested in full coverage — the 25% who work and are injured on the pier as well as the 75% who labor and are injured aboard ship. The government wanted a comprehensive bill to "cover the job". Management was unanimous in favoring complete coverage. The legislature kept searching for a formula sufficiently comprehensive to cover all maritime workers, and kept striving for "uniformity". Most authoritative is Congressman La Guardia's summation on the day the bill was passed by the house; *"This law simply gives the longshoreman the benefit of up-to-date legislation to cover injuries sustained* **in the course of their employment.** That is all there is to it" (p. 5414).

No one challenged the correctness of his explanation of the bill. That same day it was passed by the overwhelming vote of 265 to 7 by the House.

Indicative of the support of management for the bill are these excerpts from various spokesmen:

Mr. George H. Emerson, International Mercantile Marine Company. "In principle, the International Mercantile Marine Company is very much in favor of a compensation law which will compensate longshoremen . . . **We have made no difference between men who were injured on the dock and those injured on the vessels** . . ." (p. 76).

Walter J. Peterson, Esq., Pacific American Steamship Association, et al. From his association's written statement, he read this sentence:

> "That a federal maritime workmen's compensation act be enacted, which shall provide for the payment of reasonable compensation to **maritime workers** injured, and to the dependents of those killed, **in the course of their employment,** except for injuries wilfully self-inflicted." (48)

Henry C. Hunter, Esq., Council of American Shipbuilders, Inc., et al. "The shipbuilders generally are **in favor of the principle** embodied in this bill. We favor workmen's compensation . . ."

Cletus Keating, Esq., American Steamship Owners Association. "The Association is heartily in favor of a Workmen's Compensation Act to **cover the industry as a whole**" (p. 46). He insisted on including seamen under the Act.

Mr. Frank A. Fritz, T. Hogan & Sons, Inc. (a stevedoring contractor). ". . . We are **in entire sympathy with the principle** underlying the desire to compensate longshoremen."

Probably the most illuminating comments about the coverage of the act were these remarks by Cletus Keating who did not consider the phrase "on a place within the admiralty jurisdiction" adequate to accomplish the intended task of full coverage. He cautioned that "Admiralty jurisdiction" referred to the powers of the admiralty courts and included the high seas. Only injuries on United States waters or United States ships should be covered, but he said:

> "I think that coverage ought to be very carefully considered from the standpoint of jurisdiction. **We want to be sure everybody gets in under those words. And I am not sure that they do**" (p. 101).

Throughout the discussions there were references to the act as **"humanitarian legislation"** and to its being motivated by a desire to achieve **"social justice** between employer and employee."

The isolated excerpt from Senate Report 973, p. 16, relied on by Petitioners and Amicus does not show an intent to exclude pier-side injuries. It says only that coverage applies to injuries occurring between the wharf and the ship

"so as to bring them within the maritime jurisdiction." Significantly, the Report does not refer to "on the ship or gangway" but to "between the wharf and the ship." In the light of the testimony that longshoremen work constantly between the wharf and the ship, it seems obvious that exclusion of part of that work was not intended. (See *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 208, 1917.)

It is submitted, a judicious consideration of all the elements compels the conclusion the language ultimately adopted covers all maritime employment injuries irrespective of whether the particular injury occurred on a deck upon navigable waters or on a dock upon navigable waters. This Court reached that salutary interpretation in *Calbeck* — an interpretation thoroughly justified by earlier decisions and the legislative history of this beneficent act.

III.

This Court has swept aside earlier uncertainties concerning the broad scope of the Act.

Calbeck has established as the criterion of jurisdiction— **If the claim is cognizable in Admiralty the Act applies.** The kernel of the holding of this landmark decision is contained in these two sentences:

> "In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for **all injuries** sustained by employees on navigable waters and to avoid uncertainty as to the source, state or federal, of that remedy. Section 3(a) should, then, be construed to achieve these purposes" (370 U.S. at 375).

Far more important than the immediate holding in *Calbeck* — that a workman on a launched but incomplete vessel under construction was covered by the Act, despite earlier holdings to the contrary and the availability of state

benefits — was the Court's scrupulous analysis and explanation of prior decisions and, in particular, its criticism of the interpretation of the Court of Appeals for

> "Fixing the boundaries of federal coverage where the outer limits of state competence had been left by the pre-1927 constitutional decisions . . ." (370 U.S. at 375) and for the
>
> "Reading of the line of demarcation as a static one **fixed** at **pre-1927** constitutional decisions" (376).

The last excerpt we shall quote from this forward-looking decision appear on page 371; it reads:

> "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for **all injuries sustained** by employees **on navigable waters whether or not** a particular injury might also have been **within** the **constitutional reach of a state workmen's compensation law.**"

This progressive decision is but a recent application of the general rule of liberal interpretation. Compensation Acts, having a beneficent purpose, are not to be confined by prior common law or admiralty decisions restrictively construing their terms. *O'Leary v. Brown-Pacific-Maxon*, 240 U.S. 504, 506, 1951.

In this historic decision, the Court indicated its impatience with previous restrictive holdings based upon whether the man was injured while performing construction work on a vessel still in the process of being built, or doing work on a previously completed vessel undergoing repairs. Rather than encourage artificial "twilight zone" distinctions which might whittle away the rights of injured workman through the process of erosion, the court straightforwardly applied a liberal construction of the Act in order to carry out the protective policy of the law.

With consummate good sense it was pointed out that shipyard workers are subject to assignments on old "repairs", as well as new "construction"; that sometimes they work on vessels in drydock, and at other times on ships afloat in the water; and it is purely a matter of chance whether the workman is injured while assigned to one job, rather than another. This Court considered the philosophy and philanthropic purpose of the Act and experienced no qualms in "for all intents and purposes,writing out of the Act" (to paraphrase slightly Judge Palmieri in *Michigan Mutual Liability Co. v. Arrien*, 233 F. Supp. 496, 500 (S.D. N.Y. 1964)) the words "if recovery . . . may not validly be provided by State law."

Particularly illuminating is this admission which appears on pages 1 and 2 of the unsuccessful Petition for Rehearing for a Writ of Certiorari (October Term, 1964, No. 1017) filed on behalf of the stevedoring company in *Interlake Steamship v. Nielsen*, 338 F. 2d 897 (6 Cir., 1965):

> "As the statutory history and *Calbeck v. Travelers Insurance Co.* (1962) 370 U.S. 114, show, **the reach of the statute and the reach of Admiralty jurisdiction coincide.**"

The impact — and controlling effect of *Calbeck* was recognized and approved in *Boston Metals Co. v. O'Hearne*, 1964 A.M.C. 2351 (D.C., Md.), not otherwise reported, which held that the widow of a welder killed on a decommissioned hulk, fast aground and being scrapped, was entitled to benefits under the Act.

In the lucid and convincing words of Judge Winter:

> "I think the *Calbeck* case equates, I think the legislative history (of the Longshoremen's Act) supports, and I think the decisions in this Circuit also support the concept that **navigable waters** of the United States **means the admiralty jurisdiction of the United States, wherever it may be from time to time.**"

". . . I think that the *Calbeck* case makes perfectly plain that the application of the Longshoremen's and Harbor Workers' Act was not to be frozen to the admiralty jurisdiction of the United States as it then existed in 1927 or as it was considered then to exist, but that rather there may be read into the Longshoremen's and Harbor Workers' Act a more flexible concept that **under subsequent legislation or, as a result of subsequent Court decisions, the admiralty jurisdiction of the United States is being expanded and the application of the Longshoremen's and Harbor Workers' Act expands along with it.**"

The award in favor of the dependents of the deceased longshoreman was affirmed on appeal, by a unanimous court, *Boston Metals Co. v. O'Hearne*, 328 F. 2d 504 (4 Cir., 1964), cert. den. 379 U.S. 824.

A case very close on principle and facts is *Michigan Mutual Liab. Co. v. Arrien*, 233 F. Supp. 496 (S.D. N.Y., 1964). The skid on which the longshoreman was injured extended the working surface of the pier. It did not enable passengers, longshoremen or other workmen to go back and forth between the pier and the ship. It was exclusively an extension of the pier, and not of the ship. In no sense was it a gangway or gangplank.

The jurist epitomized the basis for his upholding an award under the Act of a longshoreman injured while working on the skid in this one pregnant sentence:

"It thus appears that **'upon the navigable waters' is to be equated with 'admiralty jurisdiction'** " (501).

The opinion also furnishes this very perceptive observation:

"No longer is the Act viewed as merely filling in the interstices around the shore line of the state acts, but rather as an **affirmative exercise of admiralty jurisdiction**" (233 F. Supp. at 500).

Even the most untutored in maritime law would scarcely argue that a third party claim arising out of the facts upon which these compensation claims are based is not cognizable in admiralty. The facts — failure or malfunctioning of the ship's gear, specifically, the crane — would support a libel in rem, a libel in personam (before the rules change) or a suit on the civil side with counts in unseaworthiness, negligence, and, possibly, statutory violation.

IV.

The term "navigable waters" is one of exceptionally broad scope, and includes the full range of expanded maritime concepts.

The term "navigable waters" — insofar as federal jurisdiction is concerned — is one of exceptionally broad scope. Probably the clearest definition will be found in Title 16, Section 796 of the United States Code:

> "(8) 'navigable waters' means those parts of streams or other bodies of water . . . which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids. . . ."

The national government has been notoriously jealous of its dominion over "navigable waters". Title 33, Section 403, makes it unlawful to build any "wharf, pier . . ." except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army.

In its treatment of "navigable waters" 65 C.J.S. distills an interesting facet of the law on this subject (subparagraph f. page 53):

". . . In other words, the use of a waterway need not be continuous in order to make it navigable in law, and **if it is once found to be navigable, it remains so.**"

One of the leading cases stressing the breath of the navigability concept is *Economy Light & Power Co. v. United States,* 256 U.S. 113, 65 L. Ed. 847, a 1921 decision authored by Mr. Justice Pitney. Another comparable holding will be found in *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 85 L. Ed. 243 (1941).

As far back as 1875, in *Atlee v. N.W. Union Packet Co.,* 21 Wall, 389-93, 22 L. Ed. 619, this Court held that piers are aids to navigation upon navigable waters, and an unauthorized pier was an unlawful structure.

A recent case that carefully resurveys the area is *Rochester Gas and Electric Corp. v. Federal Power Commission,* 344 F. 2d 594 (2 Cir., 1965). It reiterated that waters are navigable when they are "used or suitable for use" for the transportation of persons or property in interstate or foreign commerce. This includes all interrupting falls, shallows or rapids in said waters. A river, it pointed out, need not be navigable for its entire length, and quoted with approval from the *Appalachian Electric* case:

"When once found to be navigable, a waterway remains so" (596).

It synopsized the test of navigability and its present day application in this paragraph on page 596:

"Accordingly, we hold that the Genesee River is 'navigable waters' from Rochester to Mount Morris, if

(1) it **presently** is being used or is suitable for use, or

(2) it has been used or was suitable for use in the **past,** or

(3) it could be made suitable for use in the **future** by reasonable improvements."

When an injury occurs over navigable waters, it is submitted the relevant inquiry is not whether the injury occurred upon the ship or its equipment, but whether it occurred over and hence upon navigable waters.

It is fascinating to note that "navigable waters" have been constantly flowing inland. American admiralty and maritime jurisdiction may be traced back to the 1391 English Parliament definition of "A thing done upon the sea." (13 Rich. II c. 5 (1389) and 15 Rich. II c. 3 (1391).) To come down to the last century, this Court initially adopted the "ebb and flow" test of England where "tidal" was synonymous with "navigable". (*The Thomas Jefferson*, 10 Wheat. 428 (1825).)

This "ebb and flow" standard was rejected in *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443, 13 L. Ed. 1059 (1851), which extended admiralty jurisdiction to Lake Ontario and the other Great Lakes. The jurisdiction went further inland in *The Daniel Ball*, 10 Wall. 557, 77 U.S. 557, 10 L. Ed. 999 (1871), which made it applicable to the Grande River and other inland rivers. Coming down to current times, in *Davis v. U. S.*, 185 F. 2d 938 (9 Cir., 1950), (a criminal action involving the negligent operation of a motor boat in violation of Section 526 (1) of the Motor Boat Act of 1940) Federal jurisdiction was recognized as embracing a completely landlocked body of water — Lake Tahoe — located on the California-Nevada border, with no connection with the sea or any tributary thereof.

The zealousness of the courts in guarding the nation's rights in navigable waters and related matters is evidence from their constant insistence of the recognition of the "public property of the nation" and the "dominant servitude" in favor of the government.

On February 1, 1926, shortly before committees of the House and of the Senate were searching for the magic formula to cover all longshoremen and ship fitters and finally came up with "upon the navigable waters of the United States", this Court handed down its opinion in the case of *United States v. Holt State Bank*, 270 U.S. 49. On page 56, the Court ruled that navigability by small craft on the drought affected, sand-barred Mud Lake in Minnesota was sufficient to make the body of water navigable. Petitioners are erroneously trying to restrict navigability to waters capable of supporting large, perhaps ocean going vessels. Professor Robinson knew better and in his "Admiralty" (1939) taught us that even a light canoe is a vessel, the floating of which is adequate for navigability (pp. 34, 37-41). See also his earlier remark in *"Personal Injury in the Maritime Industry,"* 44 Harvard L. Rev. 223, 230, fn. 21, that "both wharves and ships are on the water."

Petitioners also argue that the erection of the man-made pier at Sparrows Point, Maryland permanently removed from navigation the waters beneath it. Just as the size of the vessel does not determine the navigability of the waters that bear it, neither does the presence or absence of a man-made structure determine navigability in law. One would hesitate to contend that a riparian owner could dispossess the federal government of its jealously guarded navigable waters and its admiralty jurisdiction by the simple, but rash expedient of sinking some pilings and erecting a pier. (See the 1875 case of *Atlee v. N. W. Union Packet Co.*, 21 Wall. 389.)

V.

The Johnson and Klosek cases have an additional Admiralty nexus in that the offending instrumentality was a shipboard crane.

a. ADMIRALTY IS A LIVING, VIBRANT FORCE; IT IS NOT NOW AND NEVER HAS BEEN STATIC OR STAGNANT. INDICATIVE OF ITS ABILITY TO GROW AND OF ITS ADAPTABILITY AND FLEXIBILITY ARE THE FOLLOWING:

1. *The Seaworthiness Doctrine has gone ashore.*

In *Gutirrez v. Waterman S.S. Corp.*, 373 U.S. 206, 10 L. Ed. 2d 297 (1963), the Court of Appeals had denied an award to a longshoreman for a dockside injury sustained several hundred feet from the ship's side. This Court rejected the shipowner's restrictive contentions and awarded recovery to the longshoreman injured on the pier, declaring, 209, 210:

> "Respondent contends that it is not liable, at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. **Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act**, 62 Stat. 496, 46 U.S.C. 740, **swept it away** when it made vessels on navigable waters liable for damage or injury 'notwithstanding that such damage or injury be done or consummated on land'."

(See also *O'Donnell v. Great Lakes Co.*, and *Hopson v. Texaco*, *supra*, p. 6).

2. *The Death on the High Seas Act has gone aloft.*

An intriguing case on principle is *D'Aleman v. Pan American World Airways*, 259 F. 2d 493 (2 Cir., 1958). Although the widow of the decedent did not recover because of a failure of proof, the Court held the Federal Death on the

High Seas Act (1920) applicable to a situation where an airplane passenger became terrified because of engine trouble, went into shock and died four days later. In support of its holding, the court asserted, 495:

> "The statutory expression '**on** the high seas' should be capable of expansion to **under,** or **over,** as scientific advances change the methods of travel. The law would indeed be static if a passenger on a ship were protected by the Act and another passenger in the identical location 3,000 feet above in a plane were not."

Continuing, it explained its philosophy thus:

> "To **give** to **passengers on ships protection** of the Act and **deny** similar rights to the **passengers in the air** would amount to **unjustifiable** and highly technical **discrimination.**"

3. *The Jones Act has gone underwater.*

Admiralty law and a seaman's remedies were held applicable to a diver who was injured by being surfaced too rapidly while repairing an off-shore oil well drilling rig in *Smith v. Brown & Root Marine Operators, Inc.*, 243 F. Supp. 130 (W.D. La., 1965), aff., per curiam, 376 F. 2d 832 (5 Cir., 1967).

4. *The appurtenances of a ship are extending further shoreward.*

In the immigration case of *United States v. Yee Nee How*, 105 F. Supp. 517 (S.D. Cal., 1952) a pier was held to be an extension of the vessel. In *Spann v. Lauritzen*, 344 F. 2d 204 (3 Cir., 1965) the court was dealing with discharging mechanisms far removed from traditional "ship's gear" and located not on the vessel but on the pier. Despite the modernity and locality of the equipment, it was held covered by the seaworthiness doctrine and the longshoreman injured by its malfunction entitled to recover in a third

party action. See also *Nicholson v. Aurora Shipping Co.*, 278 F. Supp. 272, 273 (S.D. Tex., 1966).

b. The Admiralty Extension Act Has Broadened Admiralty Jurisdiction.

One of the leading cases in this field is *Gutirrez*, cited in subparagraph a. 1 of this point V. The language of the Admiralty Extension Act is simple and direct. Henceforth, the admiralty and maritime jurisdiction

> "shall extend to and include **all cases** of damage or injury, to person or property, **caused by a vessel** on navigable water, notwithstanding that such damage or injury be done or consummated on land."

This extension to **"all cases"** certainly covers remedies of all types and **includes claims under the Longshoremen's Act** no less than actions at law and libels in admiralty (prior to consolidation of the rules). The expression **"caused by a vessel"** just as clearly **covers** injuries caused by **appurtenances of the vessel** even though consummated dockside.

After its enactment, the Admiralty Extension Act, 1948 (46 U.S.C. 740) was promptly recognized as being no more than declaratory of the ancient traditions respecting the extent of admiralty jurisdiction. *Strika v. Netherlands Ministry*, 185 F. 2d 555, 558, 2nd Cir., 1950, cert. den. 341 U.S. 904; *United States v. Matson Nav. Co.*, 201 F. 2d 610, 614, 9th Cir., 1953; *Diamond State Tel. Co. v. Atlantic Refining Co.*, 205 F. 2d 402, 3rd Cir., 1953; *American Bridge Co. v. The Gloria O.*, 98 F. Supp. 71, E.D. N.Y., 1951; *Fematt v. City of Los Angeles*, 196 F. Supp. 89, S.D. Calif., 1961.

Judge Edwards of the Court of Appeals for the Sixth Circuit in *Interlake Steamship v. Nielsen*, 338 F. 2d 879 (1965) summarized the present posture of the law thus:

> "It seems obvious to us that the trend of case law, the impact of the Admiralty Extension Act, and the effect

of *Calbeck* have all pointed in the direction of **expanding the boundaries of admiralty jurisdiction toward land**" (338 F. 2d at 882).

VI.

In addition to being factually upon navigable waters, piers are their indispensable adjuncts.

The facts of this case are not challenged. In the words of the Solicitor General "The relevant facts . . . are not in dispute . . ." (p. 4). Included in the undisputed verities is the fact the piers involved in the controversy are "upon navigable waters". In the Johnson-Klosek cases there is such an admission in the pleadings. The averment in the Complaint for Review in pertinent part reads:

> ". . . the Complainant (Deceased in Klosek case) was working as a longshoreman on the six hundred foot Bethlehem Steel High **Pier located upon navigable waters** . . . (Paragraph 2 of each Complaint for Review)

Paragraph 2 of the Answer read:

> "Second: This respondent **admits** the matters and facts alleged in the Second Article of the complaint" (Paragraph 2 of Nacirema Answer).

In the *Avery* case there is an express stipulation to that effect (App. 9). In the orders rejecting the claims in the Johnson and Klosek cases, Deputy Commissioner Traynor held as a fact the **"surface of the pier is situated over the navigable waters . . ."** (App. pp. 4 and 7, respectively). This, it is submitted, is dispositive of the cases. (See treatment in opinion below, pages 55 and 56 of the Appendix, including footnote 15.) If further discussion is desired, the following observations may be deemed relevant.

The Sparrows Point High Pier was not of the solid, filled-in type; it was perched stilt-like on pilings with the waters flowing freely beneath the decking. It did not divert, block

or replace the navigable waters. It is interesting to note that small boats often navigate the water beneath such piers built on, over and upon navigable waters, to inspect for excessive oil deposits and other fire hazards. There can hardly be any doubt that injuries sustained under the pier in small boats engaged in such activity would be compensable under the Longshoremen's Act.

From a historical standpoint, it may be observed contending pier injuries are excluded from admiralty jurisdiction is highly questionable. As far back as the 17th century, admiralty jurisdiction extended to all employments, maritime in fact, and to all injuries and damages sustained on piers and wharves located on navigable waters. This rule of coverage was developed from the "Ordonnance de la Marine" of Louis XIV (Liv. I, Tit. II, Articles 1, 3, 6 and 7) which gave the Admiralty exclusive jurisdiction of all shipbuilding employment and of all damages done on or to banks, wharves, moles, jettys, and similar works. (For the original French text, see Dunlap, Admiralty Practice (1836) pp. 2-4; second edition, 1850, pp. 26, 27.) Because of restrictive judicial decisions, the Royal Declaration of 1694 expressly confirmed that the exclusive admiralty jurisdiction included not only all damage and injury done by or to vessels but also all cases which occur upon the beaches and quays as well. See text in 1 Valin, *Commentary*, p. 135.

As Deputy Commissioner C. D. Calbeck stated in finding No. 9 in the Nicholson Case, the dock was a "means or connecting link in furnishing *ingress and egress from the said vessel.*" So, in the related unseaworthiness case, Judge Noel held the wharf where the injury occurred was upon the "navigable waters of the United States". *Nicholson v. Aurora Shipping Co.*, 278 F. Supp. 272, 273 (S.D. Tex., 1966). The exclusive maritime nature of a pier is evident

from this 1883 definition culled from *Langdon v. City of New York*, 93 N.Y. 129, 151:

> "A wharf is a structure on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded. Hence, waters of sufficient depth to float vessels is an essential part of every wharf. **A wharf cannot be defined or conceived except in connection with adjacent navigable waters."**

Comparable restatements will be found in 68 C. J., *Wharves*, Section 1, p. 203, and its more modern counterpart, 94 C.J.S., *Wharves*, Section 1, p. 567. See also 56 Am. Jur., *Wharves*, Section 2, pp. 1064, 1065.

A pier's "raison d'etre" is to facilitate the loading or discharging of a vessel; were it not for water commerce, there would be no piers. Logically, and functionally they are but over-sized gangways — an extension of the ship and not of the land. It is urged that the legal fiction a pier is an extension of the land was created to assist state power; it is nonetheless historically erroneous and factually illogical.

That piers are permanent structures which destroy the previous navigability of the waters over which they perch — a contention advanced by Petitioners — is an even greater fallacy. To determine the "permanency" of some of the pier structures, all one has to do is take a stroll along the shores of any seaport and note the rotting, deteriorating condition of so many of the docks. The Port of Baltimore is engaged in a modernization program during which some piers are being torn down and rebuilt and others abandoned. A recent (February, 1969) item on the maritime page of a Baltimore daily mentioned that 271 delapidated piers in the Port of New York were to be torn down.

To sum up this facet of our argument — if a pier is not deemed an "extension of the ship" or "upon navigable waters", it is far more an adjunct of "navigable waters" than is an inland marine railway to a drydock, and injuries thereon should be equally covered.

VII.

Response to arguments contained in Briefs of Petitioners and Amicus.

A. Nacirema Operating Co., Inc. and Liberty Mutual Insurance Company.

Points I and IA have already been answered, *supra.*

Point II has already been answered, *supra.*

Point III has already been answered, *supra.*

Point IV. This argument is basically a paraphrase of the complaint voiced by the Respondents in *Gutirrez* that claims arising out of faulty cargo containers in Denver and other far inland sections of the country would be flooding our admiralty courts. These dire forebodings have proved totally unfounded. Similarly, no rash of cases for land injuries were filed under the Longshoremen's and Harbor Workers' Compensation Act in the wake of this Court's decision in *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366, 1953. When injured, the shoreside mechanics working in the sheds didn't rush in to file claims under the Harbor Workers' Act. To get down to the instant cases, counsel for Respondents telephoned the Deputy Commissioner of the Court Compensation District (Baltimore, Maryland) to inquire whether any pier related cases had been filed in his office subsequent to the release of the Court of Appeals' opinion in these suits; he stated he knew of none.

If the Petitioners are insisting on a geographic boundary, it is suggested the water's edge is far more logical, functional and natural that is the edge of an artifically created pier. (See, for interpretation of Submerged Lands Act of 1953, 43 U.S.C. 1301-1315, *United States v. Louisiana*, 389 U.S. 155 (1967).)

B. Deputy Commissioners.

Point I has already been answered, *supra.*

Point II has already been answered, *supra.*

Point III has already been answered, *supra.*

C. Amicus.

The Brief of Amicus is notable for its predictions of horrendous results and unrestrained language. Illustrations of the latter are **"incredible and shocking conclusion"** (p. 8) and **"twisted and distorted . . . beyond all rhyme or reason"** (p. 11). See, also, pages 10 and 13.

The Brief contains various restatements of the one dominant theme of amicus. The arguments contained in the different subdivisions have been answered either in this Point VII or elsewhere in Respondents' Brief. A few additional remarks are in order. We challenge the correctness of the statement "Before the employer can safely start the payment of compensation benefits under these circumstances, under the Fourth Circuit 'status test', the employee's 'status' must first be ascertained or determined" (p. 20). This has not held true in the instant Klosek case; the carrier promptly started making payments in accordance with the lower Maryland schedule. This, it is submitted, is what will happen in every case in which there was a legitimate doubt concerning which act applies — the insurance company will start paying in accordance with the lower state schedule.

Our final comment is that no change in the language used by Congress is required. In adopting the final draft of the law, Congress, after much soul searching, incorporated therein the language most calculated to cover the beneficiaries of the law. The legislators could not come up with a better phrase than "upon the navigable waters of the United States." No protective law can be drafted with such precision that interpretation is rendered unnecessary. Any terminology written into the Act would be subject to the same criticism and concern expressed by Amicus in its Brief.

CONCLUSION

The Petitioners and their Amicus are importuning this Court to repudiate its own guide lines that the Act must not be applied to bring about "harsh and incongruous" results and to interpret the remedial statute as countenancing

a. the granting of benefits to a longshoreman injured on the vessel by a malfunctioning of the ship's gear and their denial to a longshoreman injured a few feet away on the pier by a malfunctioning of the same gear;

b. the granting of benefits to a longshoreman working on the pier who is struck and knocked sideways into the water and their denial to a longshoreman working alongside who is only knocked to the edge of the pier;

c. the granting of benefits to a longshoreman working on the pier who is lifted up and dropped back down on the pier, and their denial to his partner whose misfortune is to be knocked horizontally instead of being lifted vertically.

It taxes one's credulity to believe that Congress intended any such anomalies or bizarre results.

Although in planning the Act Congress may have started with a limited-objective, the more it analyzed and studied the problem, the more it realized the necessity of enacting a law that was far more embracive. From the several hundred pages of the Hearings, Reports and Debates, those arguing for a restricted and constricted application of the Act's beneficial purposes can fined solace in but a single sentence culled from an unsigned reported prepared by an unidentified aide during the early stages of the Congressional investigation (three months after the hearings started and nine months before the bill was approved) and based on a draft of the statute substantially different from the wording finally adopted.

If one thing stands out preeminently in the legislative history, it is a Congressional resolve to avoid the constitutional pitfall of lack of uniformity which caused Congress to stumble in its two earlier attempts to help longshoremen. The preoccupation of the Chairman with uniformity, and his apprehensiveness over its possible vitiating absence (the exclusion of seamen), are apparent throughout all the proceedings.

With respect to the uniformity of full coverage, there was unanimous accord. The Committees and both Houses wanted to avoid any constitutional flaw in the law; labor, both the ILA and the shipyard unions, wanted full coverage; management supported it; the government agency entrusted with the administration of the Act wanted all facets of the "job" covered. To contentiously argue that the pierside complement of 25% of the longshoreman work force is not protected by the Act is striving to defeat the very uniformity so earnestly sought — and actually achieved. Congress certainly did not design the Act to be a cruel

hoax, subjecting longshoremen members of the same gang to a pendulum type of justice swinging back and forth between state and federal jurisdiction as they performed their duties alternately aboard ship and on the pier alongside.

The legislators labored arduously to obtain the proper terminology. The formula of jurisdictional coverage ultimately chosen was "upon the navigable waters of the United States", and not the restrictive "upon a ship," "immersion in the water" or any other comparable warped or jaundiced interpretation that may be contended for by Petitioners.

In the instant case, the totality of the facts took place upon the navigable waters of the United States — in part on the deck of a pier and in part on the deck of a ship — but at all times upon the navigable waters of the Patapsco River. There is nothing in the Act to exclude any injuries which are found to occur in fact "upon the navigable waters of the United States" nor to distinguish between those on a ship "upon navigable waters" and those on a pier "upon navigable waters."

Had Mr. Justice Brown returned and sat with this Court in passing on the seamen's seaworthiness claim in *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967) he would scarcely have recognized the vigorous doctrine he sired in his 1903 *Osceola* decision. In 1946, Mr. Justice Rutledge presided over the birth of the longshoreman's seaworthiness doctrine in *Sieracki;* it, too, has now come of age and is a powerful force for good. (Witness *Mascuilli v. United States*, 387 U.S. 237 (1967).)

It may come as a shock to Petitioners who are so patently enamored of some pre-1927 views, but one cannot thrust

the mighty 42 year old oak of the Act back into its embryonic acorn. Both the seaworthiness doctrine and the Act are traceable to a common origin — solicitude for maritime workers who spend their lives in such a perilous calling. Just as the seaworthiness doctrine has grown, developed and expanded down through the years, so, too, must the Act.

Reduced to its simplest terms, the argument of Petitioners is that if the injury occurred on a deck on navigable waters, the Act applies; if on a dock on navigable waters, it does not apply. Such linguistic sophistry does violence to (a) the legislative history; (b) the protective purpose of the Act; (c) the long established principles of interpretation of remedial statutes; (d) the phenomenal growth of admiralty concepts in the more than 40 years since the passage of the Act; (e) the expansive influence of the Extension of Admiralty Act, and (f) the controlling authority of recent decisions of this Court.

It is urged that a liberal interpretation of this liberal Act, especially in the light of the beneficent maritime philosophy of *Sieracki* and the mandates of *Calbeck*, *Gutirrez and Reed*, leads unerringly to the conclusion that the death and injuries sustained in the instant cases are compensable. As one commentator succinctly expressed it — longshoremen claims must henceforth remain "at the **beck and call of Calbeck**."

This Court has been wont to stress that American Jurisprudence is motivated by "Fair Play". The fundamental issue in this litigation is this — under all the circumstances, is the position contended for by Petitioners fair and equitable, or is it "harsh and uncongruous"? Because its harshness and incongruity borders on the unconscionable, because it is unfair and inequitable, it must be rejected.

For the reasons developed in this Brief and synopsized in this Conclusion, it is urged that the decision of the Court of Appeals below be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief were served on the following attorneys for all parties herein by mailing them, postage prepaid, on this 10th day of March, 1969:

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Nos. 9 and 16

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

NACIREMA OPERATING CO., INC. AND LIBERTY MUTUAL INSURANCE COMPANY, PETITIONERS

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT AVERY

JOHN P. TRAYNOR AND JERRY C. OOSTING, DEPUTY COMMISSIONERS, PETITIONERS

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT AVERY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT AVERY

RALPH BABINOWITZ
1224 Maritime Tower
Norfolk, Virginia

INDEX

CITATIONS

CASES:

BRIEF FOR RESPONDENT AVERY

OPINIONS BELOW

The opinions below are adequately set forth in Petitioners' Briefs, except that the Deputy Commissioners' Brief inaccurately states that the District Court opinion in Avery is not reported. In fact, it is found at 245 F.Supp. 51 (E.D.Va. 1965).

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioner's Brief.

STATUTES INVOLVED

The statutes involved are set forth in the Deputy Commissioners' Brief.

QUESTIONS PRESENTED

Did not Congress, whose dominant purpose was to help longshoremen, intend the Longshoremen's Compensation Act to cover injuries caused by ship's gear to

a longshoreman in the ship's gang working the ship from a pier built in and upon freely flowing navigable waters?

STATEMENT OF THE CASE

Albert Avery was a member of the International Longshoremen's Association, Norfolk Local 1248. As is the custom, on December 28, 1961, Albert Avery "shaped up" and was hired at his I.L.A. hiring hall as a member of the ship's gang of longshoremen. The gang met aboard the ship shortly before 8:00 A.M., and the boss then decided who would work aboard the ship, and which two gangmembers would be "slingers" on the dock. (App. 45) Whether a man worked aboard the ship, or was given a "slinger" job (attaching the ship's gear to or from the cargo), was completely dependent upon orders given on that particular day. (App. 45) It is not unusual for a "slinger" to change places with a "holdman" during the day. (App. 45). Whether a member of a ship's gang of longshoremen worked in the service of the ship from the dock, or on the ship, ultimately depended on his employer's orders.

Huge heavy logs were being loaded into a deep draft cargo ship docked beside Pier B at the Port of Norfolk on December 28, 1961. (App. 8) Pier B is erected stilt-like upon wooden pilings sunk in the bed of the Elizabeth River. Freely flowing navigable tidal waters rise and fall beneath the pier. Small boats and barges navigate under the pier. (App. 45)

Pier B juts out approximately 1200 feet into the Elizabeth River, which flows beneath the pier, and two deep draft cargo ships can berth at either side of the pier. (App. 7-8) It was stipulated that the pier extended into and over navigable waters. (App. 9, 45)

Albert Avery, a member of the ship's gang assigned to the dock as a "slinger", was in a railroad car attaching the ship's cargo runners and gear to the heavy logs so that they could be lifted aboard the ship by means of the ship's winches and placed in a ship's hatch. (App. 8, 45) While a load of these logs was being lifted by the ship's winches, the logs and attached ship's cables were swung by the ship's winches against Avery, crushing him, (App. 8, 45)

thereby causing him severe, permanent injuries which have not allowed him to continue the work of a longshoreman.

Judge Sobeloff held as follows in the en banc opinion, concurred in by five Judges of the Court of Appeals for the Fourth Circuit (App. 48-56):

> "Beyond question, Congress could constitutionally ground jurisdiction on the function or status of the employees, as the Labor Department urged, and thus extend coverage to all longshoremen injured during the loading, unloading, repairing or refitting of vessels regardless of the situs of the injury. . .. The question, therefore, is whether Congress fully exercised this power, as the injured longshoremen contend, or whether it incorporated in the revised bill the phrase "upon the navigable waters" specifically to freeze coverage to injuries occurring within the admiralty tort jurisdiction as it was thought to exist in 1927, as the stevedoring and insurance companies insist . . .we find substantial support for the conclusion that Congress designed the Act to be status oriented, reaching all injuries sustained by longshoremen in the course of their employment.
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> x x x
>
> Prolonged discussion of this issue is now unnecessary, however, since it has been authoritatively resolved by the Supreme Court in Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962). Quoting with approval the Fifth Circuit in Debardelen

Coal Corp. v. Henderson, 142 F.2d 481 (1944), the Court stated:

> 'The elaborate provisions of the Act, reviewed in light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter.* * *It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority.' 320 U.S. at 130. (Emphasis added.)

x x x

This affirmative exercise of the admiralty power of Congress "to the fullest extent" of its jurisdiction, creating "a coverage co-extensive with the limits of its authority," can only mean that Congress effectively enacted a law to protect all who could constitutionally be brought within the ambit of its maritime authority.

x x x

This interpretation of the Act, giving the injured longshoreman the broadest protection, not only fully complies with the mandate of the Supreme Court in Voris v. Eikel, 346 U.S. 328, 333 (1953) that the Act be liberally construed, but also comports with the Court's observation in Calbeck, supra at 123, that the Act should be read to avoid the "uncertainty, expense, and delay of fighting out in

litigation" the proper source of compensation, state or federal.

x x x

An alternative route, advocated by some courts, would also extend coverage under the Act. Concluding that Congress had exercised the more limited tort jurisdiction. . .They reasoned, in light of Calbeck that the phrase "upon navigable waters" in this remedial legislation was not limited to the tort jurisdiction as it was thought to have existed in 1927, but must be construed to include the full range of the legislatively and judicially expanded concept of maritime jurisdiction.

x x x

. . .In Reed v. Yaka, 373 U.S. 410, 415 (1963), the Court reiterated its earlier mandate that "the Longshoremen's Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'"[12] This direction was then amplified by the explanation that "[i]t would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances* * *. [Those] subject to the same danger* * *[are] entitled to like treatment under law."

x x x

. . .First, as noted above, the injured longshoremen were members of a gang all of whom did basically the same work

for the same pay and were subjected to the same risks, passing freely from ship to pier in the course of their work. All would concede that a longshoreman crushed by a rotating draft while working in a ship's hold would be entitled to recover under the Act. It would be intolerably harsh and incongruous to deny the same benefits to a longshoreman injured while performing the same task on an adjoining pier.

x x x

. . .the Act would further extend to a longshoreman injured in the waters immediately beneath the pier regardless of how he got there; but not, the stevedores here contend, to injuries sustained by maritime workers performing traditional maritime tasks, injured on a pier above the water.

x x x

A third incongruity, that would be frozen into law if the contentions of the stevedores were to prevail, is apparent from broad liberal construction that has been applied to the term "dry dock,". . . compared with the very narrow interpretation they would attach to the phrase "upon navigable waters." We perceive no rational justification for this diverse treatment.

Finally, the parties have stipulated that small vessels are able to navigate beneath the piers on which the accidents in the instant cases took place. These waters are therefore navigable in fact. Since the jurisdictional scope of the phrase "upon navigable waters" extends to injuries occurring "above" such waters,

we are compelled to conclude that the injuries suffered by Vann, Johnson, Klosek and Avery were all sustained upon the navigable waters of the United States."

SUMMARY OF ARGUMENT

The Act covers all injuries to longshoremen within Congress's constitutional power to legislate about the subject. That any such injury might also be compensable under a State compensation act is immaterial. No doubt Congress asserted its full constitutional power via the Act, thus making jurisdiction co-extensive with the limits of its authority. Moreover, the Act itself, 33 U.S.C. Sec. 920, presumes jurisdiction unless there be "substantial evidence to the contrary."

Even if we assume Congress grounded the Act only upon Admiralty tort jurisdiction, there is no doubt that Admiralty tort jurisdiction obtains under the facts herein. The Act's jurisdictional phrase "upon the navigable waters", is thus equated with admiralty tort jurisdiction. Of course the Calbeck case rejected freezing the Act to the concept of Admiralty tort cognizance as it was merely understood in 1927.

The waters beneath the pier involved herein are navigable in fact, and used for maritime commerce.

There is no doubt that the intent of Congress in passing the Longshore Act was to help longshoremen. It would be a harsh and incongruous result to deny longshoreman Avery herein the benefits of the Act, when he faces the same risks, and does the same work, as his fellow gangmembers aboard ship.

The Act is denominated 'An act to provide compensation for disability or death resulting from injuries to employees in certain maritime employment." Clearly, nothing in the legislative history of the Act shows anything but Congressional interest in covering workers in maritime employment injured as longshoreman Avery herein.

The Court in Calbeck holds that there are areas of overlapping State and Federal coverage, and refuses to construe coverage under the Federal Act as mutually exclusive State-Federal; rather Calbeck equates Federal coverage with ". . .the limits of maritime jurisdiction." Calbeck v. Travelers Insur. Co., 370 U.S. 114, 125 (1961). Calbeck recognizes

Congress's intention in the Act to compensate longshoremen up to the limits of Congress's constitution power.

ARGUMENT

I. Congress Asserted Its Full Constitutional Power Via The Act, Thus Making Jurisdiction Coextensive With The Limits Of Its Authority.

This Court in Calbeck v. Travelers Insurance Co 370 U.S. 114, 117 (1962), stated as follows: "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law. . .." The Calbeck Court went on to say at 370 U.S. 114, 124, 126-127: "In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy exist for all injuries sustained by employees on navigabl waters, and to avoid uncertainty as to the source, state or federal, of that remedy. Section 3(a) should, then, be construed to achieve these

purposes. . ..Congress brought under the coverage of the Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law. . .." Finally, the Court in Calbeck, held at 370 U.S. 114, 130: "The elaborate provisions of the Act, viewed in the light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter. . .. It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery. . . may not validly be provided by State law' was placed in the Act not as a relinguishment of any part of the field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. . .. In the application of the Act, therefore, the broadest ground it permits of should be taken."

In Interlake S. S. Co., v. Nielson, 338 F.2d 879, 883 (6th Cir. 1964), cert. denied, 381 U.S. 934, the Court observed:

> "If Calbeck holds (and we think it does) 'that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority,' then there can be no doubt about the outcome of this appeal."

In Boston Metals Co. v. O'Hearne, 329 F.2d 504, 507 (4th Cir. 1964), cert. denied, 379 U.S. 824, when injury occurred on a dead hulk being cut up for scrap on a beach, the Court held that jurisdiction obtained under the Act, and noted, ". . .Calbeck is controlling in this case." The Court affirmed Judge Winter's decision which cogently found as follows at 1964 A.M.C. 2351 (D. Md. 1963):

> I think the Calbeck case equates, I think the legislative history [of the Longshoremen's Act] supports, and I think the decisions in this Circuit also support the concept that navigable waters of the United States means the admiralty jurisdiction of the United States, wherever it may be from time to time.

As with O'Donnell v. Great Lakes Co., 318 U.S. 36 (1943), where the Court earlier recognized that

both ships and docks are on the water and held the Jones Act to apply equally to dockside injuries in maritime employment as well as to those aboard, there is no reason for not carrying out the congressional intention that the benefit of federal legislation for maritime workers should be granted to the fullest extent of congressional power by giving a consistent reading to the words Congress employed. In O'Donnell, supra, this Court used almost the identical language in directing a broad reading of the Jones Act as the language used in Calbeck, brief herein at pp. 10-11, directing a broad reading of the Longshoremen's Act (O'Donnell at p. 39):

> Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them applicable so far as the words and the Constitution permit, and to have given to them the full support of all the constitutional power it possessed. Hence, the Act allows the recovery sought unless the Constitution forbids it.

Much earlier than the Court's controlling decision in Calbeck, supra, Davis v. Dept. of Labor, 317 U.S. 249, 256 (1952) articulated: ". . .33 U.S.C. Section 920, which provides that in proceedings under the Act, jurisdiction is to be 'presumed in

the absence of substantial evidence to the contrary'. (Emphasis added)

No doubt Congress asserted its full constitutional power via the Act, thus making jurisdiction co-extensive with the limits of its authority.

II. Even Assuming Arguendo That Congress Asserted Only Admiralty Tort Jurisdiction Via The Act, Jurisdiction Includes The Legislatively And Judicially Expanded Concept of Maritime Tort Jurisdiction.

Discussing the Longshoremen's Act, the Court in Holland v. Harris Bros., 306 F.2d 369, 373 n.4 (5th Cir. 1962) stated: ". . .the history of the Act indicates that its underlying purpose was to enbrace the admiralty jurisdiction whatever that might be. See Parker v. Motor Boat Sales, Inc., supra, especially 314 U.S. at 249-50. . .."

It is familiar in third party marine tort cases that being in and upon navigable waters, piers and their equipment, such as hoppers, cranes, etc., used in loading and unloading cargo or by persons going to and from the vessels, are appurtenances within the ordinary conception of vessels on navigable

waters. See, e.g., Thompson v. Calmar S.S. Corp., 331 F.2d 657 (3d Cir. 1964), cert. denied, 379 U.S. 913 (railroad car); Spann v. Lauritzen, 344 F.2d 204 (3d Cir. 1965); Huff v. Matson Navigation Co., 338 F.2d 205 (9th Cir. 1964), cert. denied, 380 U.S. 940. Indeed it would be truly strange and inconsistent if the same acts or ommissions which gave rise to longshoremen third-party tort claims under federal admiralty jurisdiction were held not to give rise to federal compensation claims. Admiralty jurisdiction obtained for tort claims under facts substantially the same as the instant case even before the passage of the Admiralty Extension Act, 46 U.S.C. 740. See Strika v. Netherlands Ministry, 185 F.2d 555 (2d Cir. 1950), cert. denied, 341 U.S. 904. This Court reads the Admiralty Extension Act, 46 U.S.C. Sec. 740 broadly, not restrictively, in Gutierrez v. Waterman S.S. Corp. 373 U.S. 206, 209-210 (1963) (beans on dock).

In Michigan Mutual Liability Co. v. Arrien, the Court stated as follows at 233 F. Supp. 496, 500, 501, 502 (S.D.N.Y. 1965), aff'd, 344 F.2d 640 (2d

Cir. 1965), cert. denied, 382 U.S. 835:

> What is just as important as the actual holding in Calbeck is the general approach to the Act taken by the Court. No longer is the Act viewed as merely filling in the interstices around the shore line of the state acts, but rather as an affirmative exercise of admiralty jurisdiction.
>
> . . .It thus appears that 'upon the navigable waters' is to be equated with 'admiralty jurisdiction.' Giving longshoremen the broadest possible coverage affords added clarity in the law for these men. . .
>
> . . .Needless to say, this Extension Act could be constitutional only if it was within the legislative power of Congress to adopt. . ..
>
> . . .The basis upon which the Extension Act and the Longshoremen's Act rest is the same--the admiralty jurisdiction of the United States; and both Acts must be understood to have expanded pari passu with it. Any departure from this view would compel the conclusion that the Longshoremen's Act was to be frozen to the admiralty jurisdiction of the United States as it was understood at the time of its enactment in 1927, a view rejected by the Supreme Court in the Calbeck case by clear implication.

In Boston Metals Co. v. O'Hearne, 1964 A.M.C. 2351, 2352 (D. Md. 1963), aff'd, 329 F.2d 504 (4th Cir. 1964), cert. denied, 379 U.S. 824 (injury was on a beached scrap hulk) Judge Winter stated:

> [T]rue, the Admiralty Extension Act was not passed until after the Longshoremen's and Harbor Workers' Compensation Act was passed, but I think that the Calbeck case makes perfectly plain that the application of the Longshoremen's and Harbor Workers' Act was not to be frozen to the admiralty jurisdiction of the United States as it then existed in 1927 or as it was considered then to exist, but that rather there may be read into the Longshoremen's and Harbor Workers' Act a more flexible concept that under subsequent legislation [by the Admiralty Extension Act] or as a result of subsequent Court decisions, the admiralty jurisdiction of the United States is being expanded and the application of the Longshoremen's and Harbor Workers' Act expands along with it.

It is long settled that neither in admiralty nor under the Longshoremen's Act does jurisdiction require that the injury occur on a ship. Newport News S.B. & D.D. Co. v. O'Hearne, 192 F.2d 968, 971 (4th Cir. 1951). So, in D'Aleman v. Pan American World Airways, 259 F.2d 493, 495 (2d Cir. 1958), the Court held the similar coverage language of the Death on the High Seas Act, 46 U.S.C. 761, "occurring on the high seas" extended to fatal injury by shock on an airplane which like the injury herein, was <u>over</u> and <u>above</u>, the water:

> The statutory expression "on the high seas" should be capable of expansion to, under, or over, as scientific advances change the methods of travel. The law would indeed

> be static if a passenger on a ship were protected by the Act and another passenger in the identical location three thousand feet above in a plane were not. Nor should the plane have to crash into the sea to bring the death within the Act any more than a ship should have to sink as a prerequisite.

Even assuming arguendo that Congress asserted only tort jurisdiction via the Act, jurisdiction includes the legislatively and judicially expanded concept of maritime tort jurisdiction.

III. Both The Ship, That Caused Injury Herein, The Pier From Which The Ship Was Worked, Were Upon Waters Navigable In Fact.

Pier B rests on pilings and perches above and upon freely flowing navigable waters. The waters beneath pier "B" were stipulated to be navigable in fact, and barges and other small commercial craft do navigate under the pier. Of course, the pier is in and upon waters navigable in law within Congress' Constitutional power. In holding that piers in the Elizabeth River in Norfolk, Virginia (the same navigable body which contains pier "B" herein) can be demolished without compensation to the owner via Congress' power over navigable waters, the Court in

Greenleaf - Johnson Co. v. Garrison, 237 U.S. 251, 268 (1914) stated: "The mooring of vessels is as necessary as their movement. . .." In construing an Act of Congress concerning the same subject as herein, "navigable water of the United States," the Court in Economy Light and Power Co. v. United States, 256 U.S. 113, 118 (1921) stated: "The fact, however, that artificial obstructions exist, capable of being abated by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it may be navigable in fact in its natural state." It is in no way inconsistent to speak of "injury occurring upon navigable waters, including any drydock" without special mention of docks or piers. It was familiar when the Longshoremen's Act was being drafted in 1926 that most drydocks - shipways and marine railways - are entirely on land and not in any way factual sense "upon navigable waters" as are piers and docks. Obviously, the draftsmen added "any drydock" in order to be certain to include such docks and ways as are in fact a part of dry land and not physicially "upon navigable waters." Ordinary docks and piers are

of course automatically included without any special mention because they in fact are "upon navigable waters"-just the same as is a vessel afloat. Congress therefore, had no need to add "including any pier, dock, or drydock" in order to cover injuries on docks and piers, which were already covered because of the factual situation upon navigable waters. Indeed, to prolong the list of specific mentions might have caused a restrictive construction of the meaning of "any drydock" so as to exclude shipways and marine railways, which of course the Courts have held to be under the Act, construing "drydock" broadly and liberally.

Judge Palmieri recognized the above in Michigan Mutual Liability Co. v. Arrien, 233 F.Supp. 496, 5 at n.3 (S.D.N.Y. 1964): ". . .Congress obviously expected 'docks' to be covered [by the words "upon the navigable waters"], but feared that 'drydocks' might be held by the Courts to be without the act, therefore felt it advisable to expressly mention the latter."

Both the ship that caused injury herein, and pier from which the ship was worked, were upon wat

navigable in fact.

IV. Congress' Dominant Intent Was To Help Longshoremen.

The paramount consideration in statutory construction is effectuation of the intent of the legislature. Helvering v. Stockholms Enskild Bank, 293 U.S. 84, 88-89 (1934). This Court has consistently held that with the Longshoremen's Act ". . .the dominant intent of Congress [was] to help longshoremen. . .." Reed v. Yaka, 373 U.S. 410, 415 (1963).

Judge Palmieri reasoned as follows in Michigan Mutual Liab. Co. v. Arrien, 233 F.Supp. 496, 504 (S.D. N.Y. 1965), aff'd, 344 F.2d 640 (2d Cir. 1965), cert. denied, 382 U.S. 835:

> It would be incompatible with the dominant intent of Congress to assist longshoremen, to distinguish between longshoremen injured under substantially the same circumstances, and to afford them different standards of relief. If Parisi, the injured longshoreman in this case, had been on the pallet when it broke, instead of just below it, there would be no question of this entitlement to the award. Any of Parisi's co-workers engaged in the same unloading work, but stationed at the ship's winch or at the ship's rail, would have been entitled, in case of injury, to the benefits of the federal statute. It would be anomalous and incongruous to compel Parisi to accept a different remedy. "All were subjected to the same danger. All were entitled to like treat-

ment under law." Pope and Talbot, Inc. v. Hawn, 346 U.S. 406, 413, 74 S.Ct. 202, 98 L.Ed. 143 (1953), quoted with approval in Reed v. Yaka, supra, 373 U.S. at 415, 83 S.Ct. 1349, at 1353. Thus, the result here avoids the harsh and incongruous result urged by the plaintiffs but which the Supreme Court has admonished us to avoid.

Judge Sobeloff analyzed the Act's legislative history in scholarly fashion (App. 46-50):

> "In its third attempt to provide compensation for the yet uncovered longshoremen, Congress in 1927 enacted the Longshoremen's Compensation Act.
>
> Denominated "An Act to provide compensation for disability or death resulting from injuries to employees in certain maritime employment," 44 Stat. 1424, the Act embodies a comprehensive compensation plan for all longshoremen engaged in "loading, unloading, refitting, and repairing ships," on navigable waters. S. Rep. No. 973, 69th Cong., 1st Sess., p. 16. As originally drafted, the bill provided coverage for injuries "on a place within the admiralty jurisdiction of the United States, except employment of local concern and no direct relation to navigation or commerce." S.3170 & H.R. 9498. Although enthusiastic about its general objectives, representatives of both the unions and the shipping industry uniformly voiced dissatisfaction with the bill's jurisdiction provision. At the Committee hearings, a union spokesman pointed out that as originally drawn, the effect of the bill would necessarily be harmful to repairmen and longshoremen who continually pass back and forth between state and federal jurisdiction, each

exclusive of the other. Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess., March 16 and April 2, 1926, pp. 29-31. In the same vein, spokesmen for the shipping industry complained that the bill was not sufficiently inclusive and urged that the final bill "include all maritime employment under the admiralty jurisdiction." Senate Hearings, pp. 95-101. A representative of the Labor Department also appeared and testified that Congress had sufficient power to enact a compensation statute that would extend to all injuries to maritime workers occurring "on the dock, on the bridge and in the ship," and on behalf of the department argued for an amendment to the bill that would provide "coverage of the contract and not coverage of the men in one spot performing one part of the contract." Senate Hearings pp. 40-41.

The lone dissident voice was that of the International Association of Industrial Accident Boards and Commissions, author of the pending bill and the Acts previously declared unconstitutional. It sought to maintain the limited scope of the bill, leaving as much as was constitutionally permissible to the states.

At the conclusion of the hearings, the bill was revised and submitted to Congress in its present form. While no further explanation of the various revisions is to be found in either the committee reports or congressional debates, it is certainly reasonable to infer that the modifications represent an acquiescence in the broader coverage sought by almost all witnesses and, consequently, a rejection of the narrow jurisdictional position espoused by the IAIABC.

x x x

Note 7. . .The passage from the Senate Report No. 973, 69th Cong., 1st Sess. 16, most often relied upon to support the narrow jurisdictional view that Congress intended to limit coverage to injuries within the maritime tort jurisdiction as it was then thought to exist, excluding pier-side injuries, reads as follows:

> "The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."

While it has been said that this passage suggests the Senate Committee intended the Act to be situs oriented, it is no less reasonable to read the passage as extending the benefits of the Act to all who might be brought within the maritime jurisdiction. Moreover, other passages from the Reports of both Houses indicate that Congress was primarily concerned with the status of the potential claimants. For example, in the Senate Report, in the paragraph immediately following the oft-cited passage quoted above, it is stated:

> "If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment and they are not only excluded but the Supreme Court has more than once held that Federal legislation cannot, constitutionally, be enacted that will apply State laws to this occupation. (Emphasis added.) S.Rep. No. 973, 69th Cong., 1st Sess. 16."

To like effect is H.R. Rep. No. 1767, 69th Cong., 1st Sess. 20:

> "The principle of workmen's compensation has become so firmly established that simple justice would seem to require that this class of maritime workers should be included in this legislation* * *.
>
> The bill as amended, therefore, will enable Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution of the United States by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the union." (Emphasis added.)

Or, as Congressman LaGuardia summed up:

> "This law simply gives the longshoreman the benefit of up-to-date legislation to cover injuries sustained in the course of their employment. That is all there is to it." 68th Cong. Rec. 5414.

Clearly, nothing in this history shows anything but congressional interest in covering workers in maritime employment injured as longshoreman Avery herein.

V. Petitioners Would Freeze Coverage To Longshoremen Injuries Only Occurring Within The Admiralty Tort Jurisdiction As It Was Thought To Exist In 1927.

"Workmen's compensation is not confined by common law conceptions. . .." O'Leary v. Brown - Pacific - Maxon, Inc., 340 U.S. 504, 506 (1951). Just as the

common law of independent contractor - agent is legally immaterial to the Jones Act, see Hobson v. Texaco, Inc., 382 U.S. 262 (1966), likewise "the dock as an extension of the land" doctrine has no materiality when construing the Longshoremen's Act to carry out what Congress intended, that is, provide a Federal Compensation Act for those who ". . .are mainly employed in loading, unloading, refitting or repairing ships." Norton v. Warner Co., 321 U.S. 565, 570 (1944).

Petitioners rely on State Industrial Commission v. Nordenholt Corp., 259 U.S. 263 (1922). In Nordenholt, a young employee fell to his death from a load of bags on a dock to the floor of the dock. The dead youth's mother could either receive state compensation or nothing because of Jensen. The Court allowed the mother state compensation, holding as follows at 295 U.S. 276: "There is no pertinent federal statute; and application of the local law will not work material prejudice to any characteristic feature of the general maritime law." Looking at the reality of the Nordenholt case, it is truly strange that Petitioners attempt to use it as a

restrictive device, ignoring that a federal statute now exists. Nordenholt, supra, was decided in 1922 and the Supreme Court in Calbeck v. Travelers Insurance Co., 370 U.S. 114, 118 (1962), stated:

> But we must candidly acknowledge that the decisions between 1917 and 1926 provide no reliable determinant of valid state law coverage.

Citing Nordenholt as the prime example, the Court in Calbeck, supra at 119 stated: "On the other hand, awards under state compensation acts were sustained in situations wherein the effect on uniformity was often difficult to distinguish from those found to be outside the purview of state law."

The dictum that Petitioners rely on from Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946), merely cites State Industrial Commission v. Nordenholt Corp., 259 U.S. 263 (1922) as authority. See Swanson v. Marra Bros., Inc., 328 U.S. 1, 7 (1946). Swanson is not a case under the Longshoremen's Act, but merely held that a longshoreman on a dock struck by a vessel's falling life ring could not sue his employer (not owner or operator of the vessel) under the Jones Act. Moreover, the Swanson dictum - restricting

longshoremen injured under the circumstances herein to only pursue "land tort remedies" - is obsolescent and no longer the law. Were Swanson to file suit today and name the vessel owner as defendant, there is no question the Courts would recognize and enforce his claim as a maritime tort. Guitierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Strika v. Netherlands Ministry, 185 F.2d 555 (2d Cir. 1950), cert. denied, 341 U.S. 904. And under any circumstances, the Swanson dictum cannot today be authority for withholding the Act's jurisdiction from longshoreman Avery and his fellows in light of the Supreme Court holding in Calbeck v. Travelers Insurance Co., 370 U.S. 114, 130 (1962):

> Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter. . .. Congress intended the compensation act to have a coverage co-extensive with the limits of its authority. . .its constitutional powers. . ..

Also relied on by Petitioners, T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928) concerns a widow's claim for death occurring in 1925, again before the passage of the Federal Act. Like

Nordenholt, supra, T. Smith's only significance is as a historical relic from the days before Congress acted. The Court in Michigan Mutual Liability Co. v. Arrien, 344 F.2d 640, 645 (2d Cir. 1965), cert. denied, 382 U.S. 835 correctly read T. Smith, supra, as follows:

> ". . .The Court simply held that application of a state compensation statute did not encroach upon federal admiralty jurisdiction. Mr. Justice Butler understandably did not mention the Longshoremen's Act for the federal remedy was not yet effective. We do not question that the skid on which Parisi was injured was sufficiently connected with the land to sustain an award under the State Compensation Act. But to concede this does not mean that a federal remedy is precluded; the Longshoremen's Act was intended to provide compensation for all injuries occurring upon navigable waters, "whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." Calbeck, supra, 370 U.S. at 117, 82 S.Ct. at 1198.

Petitioners reliance on 1927 vintage opinions of the Commission overlooks the fact that subsequent judicial decisions have repudiated the Commission's advisory opinions. In Calbeck v. Travelers Insurance Co., 114, 127 n.15 (1962) the Court referred to another somewhat similar long standing, but overruled,

opinion as follows:

> We attach no significance to Opinion No. 7, September 2, 1927, of the Employees Compensation Commission (now the Bureau of Employees Compensation). . .. The department was not foreclosed in the instant case from changing an interpretation of the statute which was clear error.

Calbeck expressly repudiated a determination of jurisdiction on the basis ". . .of the line of demarcation as a static one fixed at pre-1927 constitutional decisions." Calbeck v. Travelers Insurance Co., 370 U.S. 114, 126 (1962).

Petitioners misread Calbeck v. Travelers Insu Co., 370 U.S. 114, 117 (1961), ignoring the Court' statement: "Our conclusion is that Congress invoke its constitutional power so as to provide compensa for all injuries sustained by employees on navigab waters whether or not a particular injury might al have been within the constitutional reach of a sta workmen's compensation law." The Court in Calbeck, supra, holds that there are areas of overlapping state and federal compensation coverage, and refus to construe coverage as mutually exclusive state-federal, but rather equates federal coverage with

"the limits of maritime jurisdiction", 370 U.S. 125, 126:

> ". . .A restriction of federal coverage short of the limits of the maritime jurisdiction could have avoided defeating the objective of assuring a compensation remedy for every injury on navigable waters only if Congress had provided that federal compensation would reach any case not actually covered by a state statute. But in order to have accomplished this result, the statute would have had to withdraw federal coverage, not wherever a state compensation remedy "may be" validly provided, but only wherever a state compensation remedy "is" validly provided. Even if a court could properly read "may be" as meaning "is", such a reading would make federal coverage in the "local concern" area depend on whether or not a state legislature had taken certain action-an intention plainly not to be imputed to a Congress whose recent efforts to leave the matter entirely to the States had twice been struck down as unconstitutional delegations of congressional power. (Emphasis added)
>
> . . .We cannot conclude that Congress imposed such a burden on the administration of Compensation by thus perpetuating the confusion generated by Jensen. To dispel that confusion was one of the chief purposes of the Longshoremen's Act. (Emphasis added)

The Brief for The National Maritime Compensation Committee mistakenly relies on Pennsylvania R.R. Co. v. O'Rourke, 344 U.S. 334 (1953). O'Rourke did not

concern Sec. 903 of the Act, as everybody conceded that the car float upon which O'Rourke was injured was upon navigable waters. Instead, Sec. 902 (4), the definition of "employer", was only involved. The Court held that the Act applied if the employer had any employees in maritime employment, and under Sec. 905, the Act was held to bar O'Rourke's FELA action.[1]

Petitioners make much of the action by Congress in 1958 authorizing a set of safety and health regulations for the longshoring industry, wherein the House Report mentions that State safety statutes may protect the longshoreman on the dock. The report does not say that the Federal safety regulations do not cover the longshoreman in the course of his

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[1]But see Hawn & Ross Island Sand & Gravel Co., 358 U.S. 272 (1959) when employee injured on employer barge was allowed to sue his employer under state law for civil damages, notwithstanding the obvious application of the Federal Compensation Act. And today, O'Rourke could sue his Railroad employer, the owner of the barge, for breach of the warranty of seaworthiness. Reed v. The Yaka, 373 U.S. 410 (1963); Jackson v. Lykes Bros. S.S. Co. 386 U.S. 7 (1967); Schell v. C&O R.R. Co., 395 F.2d 910 (4th Cir. 1968); Biggs v. Norfolk Dredging Co., 360 F.2 360 (4th Cir. 1966). See also Is Pennsylvania R.R. Co. v. O'Rourke Still Good Law?, 1966 American Trial Lawyers Convention Transcript 104 (The W. H. Anderson Co.).

employment on the dock, and the Court's construction of the safety regulations imply such broad Federal coverage. See, e.g., Provenza v. American Export Lines, Inc., 324 F.2d 660 (4th Cir. 1963), cert. denied, 376 U.S. 952. Petitioners fail to point out the following, also found in said House Report No. 2287, 85th Congress, 2d Sess. (July 28, 1958), pp. 3844-45: "The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424: 33 U.S.C. 901 et seq.), provides compensation for injuries suffered by longshoremen, ship repairmen, ship servicemen and workers in related employment when they are working for private employers within the Federal maritime jurisdiction. . . ." (Emphasis added) In discussing the safety and health regulations for the longshoring industry, the House Report states as follows under, "Purpose of Legislation": "It is designed to bring about a greater degree of safety in the industry. . . .' (Emphasis added) ". . .[I]t was brought out that stevedoring is the most hazardous of all industries which report their experience to the bureau of labor statistics. . . . This is seven times the rate in

manufacturing activities."

Petitioners reliance on Hastings v. Mann, 340 F.2d 910 (4th Cir. 1965), cert. denied, 380 U.S. 963 is inappropriate, as it is not a case under the Act but a tort case for injury on a launching ramp. Hastings was the patron of a small, private marina and not a longshoreman entitled to the beneficient principles and protection of the Longshoremen's and Harbor Workers' Compensation Act. Hastings held that admiralty tort jurisdiction did not obtain on the launching ramp, but reasserted that admiralty tort jurisdiction obtained when harm was caused by a vessel, as herein. Moreover, if Hastings sued for breach of his maritime contract for proper marina services, he would have had an action properly cognizable within admiralty contract jurisdiction. Leavenworth Colby, Admiralty Unification, 54 Georgetown L. J. 1258, 1267 n.30 (1966).

None of the decisions from the Fifth and Ninth Circuits, relied on by the Petitioners, involve the vessel's own loading gear causing injury to a longshoreman working the ship, as herein. See

Nicholson v. Calbeck, 385 F.2d 221 (5th Cir. 1967), cert. denied, 389 U.S. 1051; Travelers Insur. Co. v. Shea, 382 F.2d 344 (5th Cir. 1967), cert. denied sub nom. McCullough v. Travelers Insur. Co., 389 U.S. 1050; Houser v. O'Leary, 383 F.2d 730 (9th Cir. 1967), cert. denied, 390 U.S. 954. These decisions misconstrue Calbeck's approach to the Act, and ignore Congress's intention to compensate longshoremen under the Act up to the limit of Congress's Constitutional power. As Judge Sobeloff states (App. 53 n.13): "It is noteworthy that the court in Travelers v. Shea, supra, fails to analyze or consider the impact of Calbeck or Yaka on the Longshoremen's Compensation Act."

Petitioners would freeze coverage to longshoremen injuries only occurring within the admiralty tort jurisdiction as it was thought to exist in 1927.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the en banc Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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